

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1916

IN THE
United States Court of Appeals

For the Second Circuit.

THE UNITED STATES JAYCEES, Inc., and
NEW YORK STATE JAYCEES, Inc.,
Appellants,

THE NEW YORK CITY JAYCEES, Inc.,
Appellee.

Docket No. 74-1916.

BRIEF OF APPELLEE.

DOMAN & BEGGANS,
295 Madison Avenue,
New York, N. Y. 10017

Attorneys for Appellee.

Of Counsel:

SHEILA MAURA KAHOE,
NICHOLAS R. DOMAN,
RONALD E. PUMP.



TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
1. Nature of the Case	2
2. The Proceedings Below	3
3. Statement of Facts	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.	7
II. THE DISTRICT COURT DID NOT ERR IN FINDING STATE ACTION.	13
A. Funding	14
B. Public Function	25
C. Tax Benefits	30
D. Other Indicia	31
III. THE DISTRICT COURT DID NOT ERR IN FINDING PERSONAL JURISDICTION OVER THE UNITED STATES JAYCEES	38
CONCLUSION	50

TABLE OF CASES

<u>American Eutectic Welding Alloys Sales Co., Inc. v. Dytron Alloys Corporation, 439 F.2d 428 (2nd Cir. 1971)</u>	46
<u>Bryant v. Finnish National Airline, 15 N.Y. 2d 426 (1965)</u>	42, 43

	<u>Page</u>
<u>Buckley v. New York Post Corp.</u> , 373 F.2d 175 (2nd Cir. 1967)	48
<u>Burton v. Wilmington Parking Authority</u> , 365 U.S. 715 (1961)	13,14,17,19, 27,35,36
<u>Delagi v. Volkswagenwerk A.G. of Wolfsburg,</u> Germany, 29 N.Y. 2d 426 (1972)	40
<u>Evans v. Newton</u> , 382 U.S. 296 (1966)	27
<u>Evans v. Sheraton Park Hotel</u> , 43 L.W. 2139 (C.A.D.C. 1974)	11
<u>Falkenstein v. Department of Revenue, State</u> <u>of Oregon</u> , 350 F. Supp. 887 (D. Ore 1972)	30,36
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973)	9,10,11
<u>Frummer v. Hilton Hotels International, Inc.</u> 19 N.Y. 2d 533 (1967)	43
<u>Geduldig v. Aiello</u> , ___ U.S. ___, 94 S. Ct. (1974)	10
<u>Grafton v. Brooklyn Law School</u> , 478 F.2d 1137 (2nd Cir. 1968)	15,16
<u>Grossner v. Trustees of Columbia University</u> , 287 F. Supp. 535 (S.D. N.Y. 1968)	15
<u>Hamilton Watch Co. v. Benrus Watch Co.</u> , 206 F.2d 738 (2nd Cir. 1953)	12
<u>Junior Chamber of Commerce of Rochester, et al.</u> <u>v. U.S. Jaycees, et al.</u> , 495 F. 2d 883 (10th Cir. 1974)	28
<u>Jackson v. Statler Foundation</u> , 496 F.2d 623 (2nd Cir. 1974)	16,35,36,37
<u>Johnson v. Rudford</u> , 449 F.2d 115 (5th Cir.1971)	7
<u>Kahn v. Shevin</u> , ___ U.S. ___, 94 S. Ct. 1134 (1974)	10
<u>Kramer v. Vogl</u> , 17 N.Y. 2d 27 (1966)	44
<u>Lee v. Macon County Board</u> , 267 F. Supp. 458, (M.D. Ala. 1967)	15,19,26

	<u>Page</u>
<u>W. Lowenthal Co. v. Colonial Woolen Mills, Inc.,</u> 38 A.D. 2d 775, 327 N.Y.S. 2d 899 (3rd Dept. 1972)	42
<u>Magro v. Lentini Bros. Moving & Storage Co.,</u> 338 F. Supp. 464 (E.D. N.Y. 1971)	26
<u>Martynn v. Darcy,</u> 333 F. Supp. 1236 (E.D. La. 1971)	37
<u>McCoy v. Schultz,</u> 73-1 U.S.T.C. (D.D.C. 1973)	31
<u>McGlotten v. Connally,</u> 338 F. Supp. 448 (D.D.C. 1972) aff'd sub. nom <u>Coit v.</u> <u>Green,</u> 404 U.S. 997 (1971)	36
<u>Moose Lodge No. 107 v. Irvis,</u> 407 U.S. 163 (1972)	16,17,19, 29,33,35
<u>Nesmith v. Y.M.C.A.,</u> 397 F.2d 96 (4th Cir.1968)	18
<u>Norwood v. Harrison,</u> 409 U.S. 839 (1973)	15,19,26
<u>Path Instruments International Corp. v.</u> <u>Asali Optical Co.,</u> 312 F. Supp. 805 (S.D.N.Y. 1970)	49
<u>Pennsylvania v. Brown,</u> 270 F. Supp. 782 (E.D. Pa. 1967)	27
<u>People v. Jewish Consumptives' Relief Society,</u> 196 Misc. 579, 92 N.Y.S. 2d 157 (1949)	42
<u>Pitts v. Department of Revenue for the State of</u> <u>Wisconsin,</u> 333 F. Supp. 662 (E.D. Wis. 1971)	30
<u>Powe v. Miles,</u> 407 F. 2d 73 (2nd Cir. 1968)	15
<u>Reed v. Reed,</u> 404 U.S. 71 (1971)	9,10,11
<u>Rodriguez v. Jones,</u> 473 F.2d 599 (1973)	47
<u>Schneider v. J&C Carpet Co.,</u> 23 A.D. 2d 103, 255 N.Y.S. 2d 717 (1st Dept. 1965)	45
<u>Singer v. Walker,</u> 15 N.Y. 2d 443 (1965)	44

	<u>Page</u>
<u>Smith v. Young Men's Christian Association</u> 316 F. Supp. 899 (M.D. Ala. 1970)	27
<u>Sunrise Toyota, Ltd. v. Toyota Motor Co.,</u> 55 F.R.D. 519 (S.D.N.Y. 1972)	41
<u>Tauza v. Susquehanna Coal Co.,</u> 220 N.Y. 259 (1917)	39
<u>U.S. v. Montreal Trust Co.,</u> 358 F.2d 239 (2nd Cir. 1966)	45
<u>United States v. United Mine Workers of America</u> 330 U.S. 258 (1947)	8
<u>Wahba v. New York University,</u> 492 F.2d 96 (2nd Cir. 1974)	31, 32, 35
<u>Weinberg v. Colonial Williamsburg, Inc.</u> 215 F. Supp. 633 (E.D. N.Y. 1963)	42

STATUTORY AUTHORITY

42 U.S.C. 2769C(c)	25
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OTHER AUTHORITIES

Case Notes, 41 Fordham Law Review 698 (1973)	16, 17
5 Harvard Civil Rights - Civil Liberties Review 460-471 (1970)	19
Notes and Comments, "Civil Rights: Closing the Back Door to Discrimination", 32 Maryland Law Review 128-143	18
Moore's Federal Practice, Para. 65.04(2) fn.1 Para. 65.21	7 11
"The Scope of Permissible State Interference with Racial Discrimination," 4 Rutgers-Camden Law Journal, 338-350 (1973)	30

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES JAYCEES, INC.
and NEW YORK STATE JAYCEES, INC.,

Appellants,

-v-

THE NEW YORK CITY JAYCEES, INC.,

Appellee.

Docket No. 74-1916

BRIEF OF APPELLEE

STATEMENT OF ISSUES

1. Whether the District Court abused its discretion in granting a preliminary injunction on the basis of the evidence before it.

2. Whether a membership organization which solicits and accepts substantial government funds and carries out civic functions which are quasi-governmental in nature and enjoys tax-exempt status is subject to constitutional limitation prohibiting arbitrary discrimination in its membership on the basis of sex?

3. Whether the District Court erred in holding that the defendants were subject to the personal jurisdiction of the New York Courts.

STATEMENT OF THE CASE

1. Nature of the Case

This action was brought by the NEW YORK CITY JAYCEES ("Local") seeking a preliminary and permanent injunction prohibiting the defendants, the UNITED STATES JAYCEES ("National") and the NEW YORK STATE JAYCEES ("State") from revoking Local's charter solely because Local changed its by-laws and admitted women to full membership. Local has alleged that revocation of its charter on this ground is a violation of the Fifth and Fourteenth Amendments of the U. S. Constitution as well as being contrary to various federal statutes. In addition, Local has alleged that the revocation of its charter on this basis is a violation of New York State law.

As noted by National^{1/} in its brief to this Court, this is the second case in the Federal Courts which raises the issue of female membership in the Jaycees. (Appellant's

^{1/} Although State is and has been a named defendant from the commencement of this suit, it has taken no active role in any of the proceedings; the appellants will be referred to as National unless otherwise noted. Reference to their Brief will be as "Appellant's Brief".

Brief, p.2) However, as pointed out by the District Court in the case at bar, the facts from the record in the other case are unclear, especially in the area of State action.

2. The Proceedings Below

Local, which is the New York corporation, is also chartered as a chapter of National and State. In May 1973, Local amended its by-laws to permit full membership to women. The reasons for this by-law change will be discussed more fully in the STATEMENT OF FACTS. As a result of the by-law change, National ordered Local to appear in Tulsa to show cause why its charter should not be revoked.

Local brought an action in the District Court seeking preliminary and permanent injunctive relief against this threat after all efforts within the organization failed to achieve any modification of National's position. A Temporary Restraining Order was issued on February 11, 1974 and extended by consent of defendants pending decision on the motion for a preliminary injunction.

After submission of evidentiary affidavits and Memoranda of Law, a hearing was held on the preliminary injunction on April 9, 1974. At that time National moved to quash service for lack of personal jurisdiction. On June 13, the District Court issued its decision granting Local's motion for the preliminary injunction and denying National's motion to quash for lack of personal jurisdiction.

3. Statement of Facts

Many of the facts presented to the Court are virtually uncontested. The District Court sets forth in considerable detail the history and relationship of the Jaycee organization. National admits that the facts found by the district court are consistent with the evidence presented (Appellant's Brief, p. 12), but argues that the Court has misapplied the law to these facts.

The facts of this case are fairly simple. On May 31, 1973, Local amended its by-laws to allow full and equal membership for women. Local was prompted to take this action not only because its male members felt the decision was morally and ethically necessary (for example, women had long since contributed substantially to the activities of the organization), but also because of certain outside influences. Local had been advised by the Office of the New York State Attorney General that continued discrimination by Local on the basis of sex would be construed as a violation of the New York State Executive Law (Joint Appendix, p. A-7^{2/}). Furthermore, Local was advised by certain of

^{2/} The full text of the Attorney General's letter is set forth in Appellee's Supplemental Appendix, marked Exhibit "G".

its corporate sponsors that support for the organization would be withdrawn if the baseless discriminatory policy was not eliminated. Thus, as a result of pressures within and without the organization, Local changed its by-laws. As a result of this change, Local was informed by National that its charter would be revoked. In fact, the resolution revoking Local's charter has been conditionally passed by National (Joint Appendix, p. A-255) and Local has been advised that if the injunction granted by the district court is dissolved, its charter is automatically revoked without any further notice or action being required.

It is admitted that the purpose of National is to provide services to affiliated state organizations and local chapters. (Appellant's Brief, p. 6.) National is therefore an "umbrella" organization. It is also admitted that in the past few years the Jaycee organizations have shifted their primary emphasis from the promotion of the business interests of their members to an emphasis on community service programs. (Appellant's Brief, p. 6.) In fact, in testifying for National, Vice President Roper stated that the purpose of this shift in emphasis was "to establish a very broad base membership representative of all segments of our population." (Joint Appendix, p. A-64.)

As a result of this shift to community service emphasis,

National began in 1973 to apply for and receive federal funds pursuant to various programs. The Court below found that in the 1974 fiscal year the federal funds accounted for 31.4% of National's total budget, or \$1,143,000.00.

SUMMARY OF ARGUMENT

The District Court properly granted Local's motion for a preliminary injunction and properly denied National's motion to quash for lack of personal jurisdiction. The granting of a preliminary injunction is within the sound discretion of the trial court. There can be no showing on the part of National that the decision of the District Court was so clearly erroneous as to be an abuse of discretion, and therefore, the Appellate Court should not disturb the preliminary injunction.

Further, the District Court did not err in finding "state action". Local has shown sufficient indicia to point to a symbiotic tie between the Jaycees and the government. There is evidence of substantial financial assistance to the Jaycees; there is evidence that the Jaycees are engaging in work which serves a public function and that is governmental or quasi-governmental in nature; the Jaycees are a tax-exempt organization. These are sufficient factors when taken together to constitute state

action.

Finally, the District Court properly found personal jurisdiction over National. National collects dues, directs programs, and controls policy to such an extent that it effectively does business in the State of New York and hence is subject to the jurisdiction of the court.

ARGUMENT

I. THE DISTRICT COURT DID
NOT ABUSE ITS DISCRETION
IN GRANTING THE PRELIMINARY
INJUNCTION.

The purpose of a preliminary injunction is to preserve the status quo pending final determination of the action after a full hearing. Johnson v. Rudford, 449 F.2d 115 (5th Cir. 1971). The granting of a preliminary injunction is addressed to the judicial discretion of the district court. Moore's Federal Practice, Para. 65.04(2) fn. 1 and cases.

The District Court in the case at bar has granted a preliminary injunction. That order, which is of course interlocutory, was appealed by National pursuant to 28 USC Sec. 1292(a).

In exercising its discretion and granting a preliminary injunction the trial court must look at several factors.

First, the court evaluates the probability of success on the part of the plaintiff and this test is satisfied by a showing that the plaintiff is likely to prevail at a trial on the merits. Second, the court must consider the irreparable injury or probable danger to the plaintiff if the injunction is not granted. Third, there must be a balancing of the equities between plaintiff and defendant, that is, plaintiff must not only show danger to itself, but must show that the injunction would not cause worse injury to the defendant. Finally, the courts also consider the public interest as a factor and when the granting of the injunction would aid the public interest, then this aspect becomes highly material. United States v. United Mine Workers of America, 330 U.S. 258 (1947).

The District Court considered all these factors and concluded that:

"...the plaintiff has met its heavy burden of demonstrating a combination of probable success and possibility of irreparable injury. The balance of hardships also tips in its favor."
(Joint Appendix, p. A-402.)

There is little doubt that the equities weigh in favor of Local. Local sought and obtained a solely negative injunction preventing National or State from revoking Local's charter. The affidavits submitted by Local, especially those in support of the temporary restraining order show

that revocation of Local's charter will create legal turmoil in its affairs, will imperil Local's administration of or participation in federally funded programs, and will effectively place Local in a legal "limbo" with its very corporate existence in doubt. National on the other hand has shown no potential injury whatsoever because of the injunction.

The case at bar is clearly one in which public interest is highly relevant. This case is one in a long history of discrimination cases. Here the discrimination is based on sex. National seeks to revoke Local's charter solely because Local has admitted women to membership. National made no claim that "associational" interests would be impaired, nor could it since it asserts itself that women play a large role in all its activities.

The District Court in its decision pointed out that recently the Supreme Court decided that irrational discrimination solely on the basis of sex violates the constitutional guarantees of equal protection. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973) (Joint Appendix, p. A-394.)

National argues however that to the extent the District Court went further and found sex to be a suspect classification requiring strict scrutiny of the basis thereof, it

erred. (Appellant's Brief, p. 14.) At this juncture National cites Kahn v. Shevin, _____ U.S. _____, 94 S.Ct. 1134 (1974) and Geduldig v. Aiello, _____ U.S. _____, 94 S.Ct. 2485 (1974). These cases are clearly inapplicable to the instant case. In Kahn, the Supreme Court stated that the factual background of this case is "not like Frontiero v. Richardson," and pointed out that:

"...if discrimination is founded upon reasonable distinction or difference in state policy it is not in conflict with the Federal Constitution."
Kahn at 1736.

Nor does the holding Geduldig in any way limit the rationale of Reed and Frontiero. Again, the court is dealing with a classification, here insurance coverage under a state disability program, and finds this classification reasonable.

There is no indication here that the Supreme Court would find the exclusion of females from the Jaycees should be examined solely on the basis of "reasonableness" nor that faced with a substantially different fact situation, the Court would refuse to apply the "strict scrutiny" criterion employed for suspect classifications. In Kahn and Geduldig, it may be observed, all that was decided was that a lesser test of "reasonableness" was sufficient to support the challenged action. The District Court applying the

Frontiero and Reed rationale found that the discrimination on the basis of sex was not reasonable.

Furthermore, courts are continuing to expand to Frontiero rationale in dealing with discrimination. Recently, a court citing Frontiero held that the mere existence of sex segregated local unions within an international union constituted a per se violation of Title VII of the Civil Rights Act. Evans v. Sheraton Park Hotel, 43 L.W. 2139 (C.A.D.C. 1974).

It must be remembered that the scope of the appellate review of a preliminary injunction goes not to the ultimate merits of the case, but rather, the test on appeal is "whether the district court abused its discretion and not whether the appellate court would have granted or denied the injunction." Moore's Federal Practice, Para. 65.21 p. 65-157. As this Court has pointed out:

"To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

As here the trial judge's findings derived from evidence presented at a preliminary hearing, they may perhaps be altered after a full-dress one. Yet, although we recognize them as necessarily tentative, they have such support in the oral testimony that we cannot possibly declare them 'clearly erroneous'; we must therefore accept them on this appeal." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2nd Cir. 1953) at 740.

National in its brief has set forth certain conclusions which it says are undisputed on the basis of the evidence. Local contends that there is little dispute as to the facts leading up to the need for the preliminary injunction. However, Local disagrees that the evidence presented at the hearing is not contested. The relationships between National, the Foundation, and the contracting agencies were sketched only very superficially. Local is certainly entitled to discovery on this point.

National and Local also disagree as to whether Mainstream grants must be limited to a Jaycee Chapter working in conjunction with a Community Action Agency. (Appellant's Brief, p. 11.) Here too the parties are entitled to full discovery, particularly in view of the conclusions as to the impact of the admitted sex discrimination which would be drawn if such limitation is found to be the case.

The question to be determined by this appeal is whether

or not the decision of the trial court was so clearly erroneous in the light of the evidence as to be an abuse of discretion.

Local contends that the District Court in reviewing the evidence before it properly found that Local had made a sufficient showing of probable success and irreparable injury. In addition, the Court found that the public interest in a case involving discrimination tipped the scales in favor of the injunction.

There was no abuse of discretion on the part of the District Court and hence this Court should not disturb the preliminary injunction.

II. THE DISTRICT COURT DID NOT
ERR IN FINDING STATE ACTION.

Whether or not the Jaycee organization may discriminate in its membership policies is dependent on whether or not there is sufficient evidence of what the courts have labeled "state action". The District Court, applying the now traditional test set forth in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) found that

"the congeries of factors here involved make the action of the United States Jaycees in attempting to revoke the charter of the New York City Chapter 'state action' and subject to the jurisdiction of the federal courts." (Joint Appendix, pp. A-397-398.)

National contends that the District Court improperly applied the Burton test and that in fact "state action is wholly lacking". (Appellant's Brief, p. 19.)

The District Court properly analyzed the relationship between National and the government and correctly found state action. It must be remembered that when the Supreme Court set forth the Burton test it noted that the "sifting and weighing of circumstances" was directed toward the "non-obvious involvement of the state in private conduct". Burton, at 722.

Local contends that there are three significant facts to which the court must look in applying the Burton test: (1) the substantial federal and state monies which support various Jaycee projects and programs; (2) the function and services of the Jaycee organization which may be termed public functions; and (3) the tax benefits granted to the Jaycee organizations which permit them to operate as tax-exempt organizations and solicit funds which in turn are tax deductible.

A. Funding

It is not contested that large amounts of federal monies support various Jaycee programs. Appellant's Brief on pages 7 through 9 sets forth many of the programs which

receive government support and the amount of this support.

Despite this substantial funding, however, National argues that there can be no challenge to the internal membership policies of the Jaycees since the ultimate beneficiaries of the program are not discriminated against.

Our courts have consistently held that financial support by the government is indicia of state action. For instance, financial aid to private schools which practice racial discrimination has been held to be a denial of equal protection. Norwood v. Harrison, 409 U.S. 839 (1973); Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967).

National argues, citing Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968) and Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968), that the receipt of money without more is not enough to find state action. (Appellant's Brief, pp. 15-16.) Local agrees. It was never argued by Local that the mere receipt of money constituted state action. Local claims that this is merely one of the factors which the court must weigh in determining state action.

What National fails to point out in citing these cases is that these cases do not involve discrimination but rather questions of due process. In both Powe and in Grafton v.

Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1968), this Court noted that if admission policies of these colleges were challenged as being discriminatory, no one would question that such conduct would constitute state action. Powe, supra, at 82; Grafton, supra, at 1142. This Court has held that when reviewing discrimination it will apply a different standard. Jackson v. Statler Foundation, 496 F.2d 623 (2nd Cir. 1974) at 628.

National relies heavily on the recent Supreme Court case Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). National argues that like Moose Lodge, its membership policies should not be subject to any constitutional restraints. Again, Local does not assert that a private membership organization having only a limited connection with the local government by the mere holding of a liquor license is subject to a constitutional challenge on the basis of discrimination. It is clear that "no court has ever found state action from the mere issuance of a license," for the private benefit of the group. Case Notes, 41 Fordham Law Review 698 (1973) at 700.

There is an important and significant distinction between the Moose Lodge and the Jaycees. In Moose Lodge, the Court found that a single state benefit has been conferred. The benefit, a state liquor license, did not

create the type of relationship necessary to create the "symbiotic" relationship which under the Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) was necessary. In Moose Lodge, for instance, the Court noted that Moose Lodge was not publicly funded. Moose Lodge, supra, at 171. This is clearly not the case with the Jaycees who admit the nature of their funding. In addition, the Court pointed out that Moose Lodge does not "discharge a function or perform a service that would otherwise in all likelihood be performed by the State." Moose Lodge, supra, at 175.

The Moose Lodge decision cannot be read as holding that a membership organization may discriminate simply by claiming it is a private club but rather

"If anything the Moose Lodge decision testifies to the continuing vitality of the State action requirement. ...The State in Moose Lodge was not sufficiently implicated in Moose Lodge's discriminatory policies because it was not with it a 'partner' or 'joint venturer'. While these terms do not envision a literal partnership or joint venture - such not having been apparent in Burton, the relied upon precedent - very little else may be said about them other than they contemplate the existence of at least a symbiotic relationship. What is 'symbiotic'? Burton is - Moose Lodge is not! 41 Fordham Law Review, supra at 702."

There has been a great deal of debate among authori-

ties as to what makes a club or organization private. The Civil Rights Act of 1964 contains no standards for qualifying an organization as private, but rather has left the courts to develop a case-by-case test. Notes and Comments, "Civil Rights: Closing the Back Door to Discrimination", 32 Maryland Law Review 128-143 at 138. There is no generally accepted test, but the courts have looked to factors such as advertising, members' reasons for organizing, financial structure. 32 Maryland Law Review, supra, at 138-139.

The factor which has influenced courts most strongly, however, seems to be genuine selectivity as to membership on a reasonable basis.. Clubs which offer membership to all white persons within a specific geographic area have not been accorded "private" status by the courts. Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968). There is inherent injustice and arbitrariness in closing off certain activities to a given segment of society (here closing off membership in a business-civic association to women). Membership in the Jaycees, by definition, trains one for leadership in business and in the community.

"The question is one of equality of opportunity in a socioeconomic realm ... and frequently there will be significant economic effects attendant upon this 'social' discrimination, a

potential transaction of business is arbitrarily prevented from coming together." 5 Harvard Civil Rights - Civil Liberties Law Review, 460-471 (1970) at 470.

As the Court in Moose Lodge pointed out, no easy test for determining state action has yet been fashioned. Yet clearly a relationship between private parties and state or federal authorities can convert acts otherwise private, into acts subject to constitutional limitations. Burton, supra. In addition, the State is forbidden to do indirectly what it cannot do directly and may not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Norwood v. Harrison, supra, citing Lee v. Macon County Board of Education, 267 F. Supp. 458.

National is arguing in effect that since there is no discrimination as to the ultimate beneficiaries or objects as distinguished from discrimination as to decision making voting membership, there is no nexus between the government funding and the discrimination. (Appellant's Brief, p. 17-18.) However, by tracing the funds to the beneficiaries the effect of National's discrimination on the objects themselves becomes clear. Project Mainstream is the largest government grant awarded to the Jaycees. Project Mainstream's funds are available only to Jaycee chapters in

partnership with a Community Action Agency. (Joint Appendix, p. A-54.) Local has received part of a Mainstream grant. If it is disaffiliated (because of female members), it will no longer be eligible to receive Mainstream funds. Ms. Washington testified as to this requirement (Joint Appendix, p. A-54) but National has challenged but not refuted this interpretation (Appellant's Brief, p. 11). However, the Project Summary submitted by National to the Office of Economic Opportunity clearly outlines a partnership between the Jaycees and Community Action Agencies. (Joint Appendix, pp. A-113, A-118 et seq.) When the question was posed to Mr. Roper, his response was that he could not answer and that the matter would be referred to (among others) the Coordinating Council (Joint Appendix, p. A-81). The Coordinating Council referred to is THE UNITED STATES JAYCEES PROJECT MAINSTREAM NATIONAL ADVISORY COUNCIL. The composition of this Council is set forth in the Joint Appendix, pp. A-150-152. Since Ms. Washington is a member of this Council and since no serious attempt was made to refute her testimony, the District Court accepted her testimony as an accurate representation of the status of the grant. National now argues (Appellant's Brief, p. 26) that the District Court erred in finding this Council in "control" of the Jaycees. But National has misinter-

preted the District Court's finding. (Joint Appendix, p. A-400.) The District Court found there is control over the recipient of the Mainstream monies by the Council. In addition, the Court found that four government departments were represented on the Council. As to what National calls the "undisputed facts" (Appellant's Brief, p. 26) regarding the relationship of the Jaycees, the Council, Together, Inc., as pointed out in Point I of this Brief, these specific relationships are not totally clear and should be the subject of further discovery. It is therefore clear that if plaintiff is disaffiliated because of the admission of women members, it will no longer be eligible for Mainstream funds. The program which it has begun with the funds will no longer be able to continue, and thus the ultimate beneficiaries of the federal funds will suffer solely because of the discriminatory membership policy of the Jaycees.

National also dispenses what it calls "seed grants" to the local chapters out of its government contracts which are unrelated to the Mainstream project. (Joint Appendix, p. A-70.) Furthermore, even when money is not dispensed directly to local chapters it is used to benefit the local chapters by way of training and materials (Joint Appendix, p. A-73). If a local chapter is cut off from these resources because it no longer qualifies as a Jaycee

chapter, then the community in which the "offending" chapter is located is also cut off from the benefit of the federal money. If National were to succeed in this action, its attempt to charter a successor chapter, restricted to male membership, would still run afoul of New York State law. Despite the fact that Local informed National of the letter of the New York State Attorney General (Supplemental Appendix, Exhibit "G"), National has refused to even acknowledge the possibility that its discriminatory policy might be in violation of a State law. (Joint Appendix, pp. A-84-85.) This is certainly a presumptuous display of parochialism on the part of the organization which purports to represent a broad base in the community. (Joint Appendix, p. A-64.) If the by-law is found to be a violation of State law, then National is in violation of a provision of its OEO contract which directly commands compliance with local laws by those parties accepting any OEO grant. (Joint Appendix, p. A-271.)

Both sides have presented exhibits to the Court which show the terms and conditions of the various grants received by the Jaycees from the Federal government. The Court's attention is respectfully directed to Pages A-258 and A-267 of the Joint Appendix. A-258 shows a letter from OEO which specifically states that the grant "is sub-

ject to your acceptance of the conditions described in the enclosed grant and attachments" The OEO grant sets forth conditions with respect to delegate agencies as shown on Page A-267. The conditions of the grant are applicable to both the grantee and any delegate agencies or organizations who undertake responsibility for any part of the program. National is clearly a grantee and in some cases is a delegate agency. Mr. Roper testified that National was aware of the conditions in the OEO grant prohibiting discrimination. (Joint Appendix, p. A-79.)

The OEO grant specifically prohibits sex discrimination:

"6. DISCRIMINATION PROHIBITED. No person in the United States shall, on the ground of race, color, religion, sex, age, or national origin, be excluded from participation in, be denied the proceeds of, or be subject to discrimination under the program approved as a result of this funding request. The grantee and its delegate agencies will comply with the regulations promulgated by the Director of OEO, pursuant to the Civil Rights Act of 1964, and pursuant to the Economic Opportunity Act of 1964, as amended." (Joint Appendix, p. A-78; A-267.)

National argues that since women can participate in the program on second class levels, as auxiliaries for instance, they are therefore not in violation of this provi-

sion of the OEO condition. In addition, National contends that the "undisputed testimony of Mr. Roper in this case is that OEO investigated and concluded that the federal anti-discrimination condition is not being violated by the Jaycees." (Appellant's Brief, p. 27.) Clearly, this sounds incredible and is not the best evidence of what the OEO did or did not do. This is another area which calls for proper discovery. Local is unaware of any official approval by OEO of the discriminatory by-law. And even if this Court were to assume arguendo that OEO approved sex discrimination (despite the obvious language of its own contract) that still would not resolve the issue of possible violation of New York State law. Furthermore, if this reasoning is followed to its logical conclusion, then the Jaycees have found a way to circumvent the Civil Rights statutes and the constitutional prohibition against discrimination. If National's reasoning is correct, then the Government, by the simple means of funneling monies through "private" organizations to perform community projects can discriminate at will and leave no remedy for this discrimination. That the Government may not do indirectly what it cannot do directly is a long-established principle of constitutional law and it would be inconsistent if the legislative intent and the constitutional interpretations set forth by the courts allowed the Government to promote or encourage discrimination by supporting organizations which defiantly

discriminate.

There is ample legislative approval for eliminating discrimination based on sex. Congress has passed the Civil Rights Act of 1957; the Jury Selection and Service Act of 1968; the Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972; and, of course, the Equal Rights Amendment.

The requirement of absence of discrimination in government sponsored programs is shown by the language of 42 U.S.C. 2769C(c):

"Programs approved under this part shall, to the maximum extent feasible, contribute to the elimination of artificial barriers to employment and occupational advancements."

B. Public Function

National argues that the court has misapplied the public function argument. (Appellant's Brief, Point III, p. 24 et. seq.) The so-called public function argument is only one of the tests at which the courts look in determining whether or not there is a state action. Appellant's Brief seeks to treat this test in isolation from the key issue involved in this litigation. It contends, in effect, that if National doesn't discriminate among beneficiaries in the performance of public functions, they are nevertheless

free to discriminate insofar as the decision making power of the membership is concerned.

As stated before, a purely private person is free to discriminate at will. However, private persons performing traditionally public functions, particularly when applying for and using public funds, may become subject to constitutional restrictions. Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971).

There is no real question that the Jaycee organization performs functions which are governmental in nature. The trial court found this to be so, pointing out that a simple recitation of Jaycee projects makes this evident. (Joint Appendix, p. A-399.) (This Court is also respectfully referred to Appellee's Supplemental Appendix detailing the service programs of the Jaycees.)

Again, as in its funding argument, National argues that the programs themselves are not discriminatory (Appellant's Brief, p. 24).

In 1973, the Supreme Court of the United States reiterated the principle that the State may not do indirectly what it cannot do directly. Said the Court, the State

"... may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Norwood v. Harrison, 93 S.Ct. 2804 at 2810 (1973), citing Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967).

The programs of the organization are such that if the Jaycees did not perform them, some agency of the government would be required to act. Since the government cannot discriminate by excluding certain classes from directing and implementing its various programs, any more than the government can discriminate as to the beneficiaries of its programs, then an agent or joint venturer of the government cannot be permitted to engage in any such discrimination.

It is not a new principle that private entities which perform governmental services or are substantially supported by State assistance are subject to constitutional limitations. Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, supra; Smith v. Young Men's Christian Association, 316 F. Supp. 899 (M.D. Ala. 1970); Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967).

It has also been pointed out by two courts that there is no rational explanation for National's insistence upon maintaining its discriminatory membership policies. The District Court here, for instance, stated:

"No logical reason has been offered, however, why women cannot be full Jaycee members except that the male membership would like to keep it that way." (Joint Appendix, p. A-393.)

Even the Tenth Circuit, while it declined to find state action, still commented:

"Why the defendant Jaycees would so adamantly oppose members of the feminine sex in its organization is most difficult to understand. It may well be that they fear the competition. They may indeed be concerned as to the known propensity of members of the feminine sex to devote themselves to causes such as this. We are not, however, permitted to pursue this inquiry--our mission being to ascertain whether the action complained of is sufficiently governmental to justify the federal courts' entertaining and taking cognizance of the claims." Junior Chamber of Commerce of Rochester, et al. v. U. S. Jaycees, et al. 495 F. 2d 883 (10th Cir. 1974) at 884 fn. 1.

National continues to argue that despite its heavy involvement in government funds and the public function that there still is no justification for judicial scrutiny of the membership policies of the organization.

As previously noted, National allows and encourages women to participate on every level of the Jaycee organization, except as decision making members. But the fact that women are permitted to hold second-level managerial jobs on National's staff in Tulsa, or the fact that women are encouraged to work on the various Jaycee projects, points up the irrationality of the membership policy. Women are welcome in the Jaycees as non-voting workers; but they are excluded on any level where policy decisions are made.

Clearly, this is a very different situation from Moose Lodge. In the Jaycees women ~~are~~ encouraged to participate. Moose Lodge had a discriminatory policy which had at least some surface justification, i.e., the preserving of an "enclave" of a particularly defined class for social purposes.

The issue in this light is even clearer in this particular case. A major policy decision has been made by the restricted voting class to expel Local, solely because it admits women to membership, i.e., voting rights within the organization. They are not voiding the charter of Local because women participate in the activities. The threatened act of National is directed solely at preventing women from having a voice in policy decisions, a substantial number of which relate to the seeking and administration of government grants.

Hence the transfer of government monies and the membership policy of National are directly and intimately connected. The sole purpose of National's attempt to revoke Local's charter is to preserve the control of policy decisions solely in male hands.

C. TAX BENEFITS

At least three federal courts in recent years have reached the conclusion that the granting of state and federal tax benefits to private organizations is sufficient to subject the organization to constitutional restrictions. In Pitts v. Department of Revenue for the State of Wisconsin, 333 F. Supp. 662 (E.D. Wis. 1971), the court ruled that granting tax exemptions to organizations which have discriminatory membership policies "encourages discrimination in violation of . . . the equal protection clause of the Fourteenth Amendment." Pitts, supra at 669. See also "The Scope of Permissible State Interference with Racial Discrimination by Private Fraternal Organizations." 4 Rutgers-Camden Law Journal, 338-350 (1973). Similarly, in Falkenstein v. Department of Revenue, State of Oregon, 350 F. Supp. 887 (D. Ore. 1972), the court held that deductions and exemptions provided an organization with a benefit and indicated government "approval" of the organization.

Both of these cases held that the tax exemptions given to these private fraternal organizations having discriminatory membership policies violated the equal protection clause.

Nor does the decision of McCoy v. Schultz, 73-1 U.S.T.C. (D.D.C.1973) vitiate the holding of the above cases, since McCoy is clearly distinguishable. There the Court found no federal involvement because of the tax exemption, but noted that unlike the Jaycees, the Portland City Club did not perform any public functions, engage in activity on publicly owned property, rely on public assistance in the conduct of its affairs or receive public funds. McCoy Decision, p. 15. Clearly, the case before this Court does not involve the single aspect of a tax deduction with nothing else and hence McCoy is inapplicable.

D. Other Indicia of State Action

We have thus far discussed state action in the light of the Burton test and the three most common factors which have been used by our courts to determine the effect of the "non-obvious government involvement."

This Court has recently spoken with approval of this test stating that the task of "sifting facts and weighing circumstances" is

" . . . a procedure which, despite contemporary criticism of the opinion for failure to afford sufficient guidance, has survived much better than attempts at more definitive formulations." Wahba

v. New York University,
492 F. 2d 96 (2nd Cir. 1974)
at 102.

The Wahba case has evolved a further test when reviewing the question of state action. The case involved federally funded research grants and while finding that there was not sufficient state action, the court pointed out that the following "variables should be considered, principally

- 1) the degree of government involvement,
- 2) the offensiveness of the conduct and
- 3) the value of preserving a private sector free from constitutional requirements." Wahba, at 102.

National argues that by applying the above test the District Court should have reached the opposite conclusion. (Appellant's Brief, p. 17). National states that the degree of government involvement is merely an underwriting by the government of specific projects. Yet, undeniably, the Jaycees are involved with state and federal governments because of both the funding and the civic and public nature of their activities. Furthermore, it must be remembered, the full extent of the government involvement is not yet known, since the District Court directed its inquiry primar-

ily towards federal money.

National also argues that if it is forced to eliminate its discriminatory membership policies, the Jaycees might abandon their social work. (Appellant's Brief, p.18). Yet as previously noted, if the Jaycee chapters which admit women are immediately excluded from the National organization (and the number of local chapters which are admitting women is growing steadily) then the social programs of the U. S. Jaycees, which are operated through the local chapters, will be denied to the community in which that chapter is located. And, of course, such a threat by National assumes that National's interest in excluding women from policy decisions is so strong that the risk of destruction of the entire organization would not deter such a course of conduct. Yet, National has never given any explanation or reason for such policy other than personal preference of the existing voting class.

Finally, National argues that the conduct of the Jaycees is no less offensive than the racially restrictive policies of Moose Lodge. (Appellant's Brief, p. 18). Pre-scinding from the general moral argument that such invidious policies are offensive to most persons regardless of the nature of the organization, it may be conceded that Moose

Lodge had at least some "associational" arguments in its favor. The Lodge is strictly a social club. The conduct on the part of the Jaycees is far more offensive to a great number of people, male and female, precisely because its associational raison d'etre is directed outwards to the community and not merely for internal purposes of promoting "good fellowship".

This conduct affects important relationships in the business and economic community. A recognized purpose of the Jaycees is to provide leadership training to "men" so that they may climb the corporate ladders and achieve exceptional success in their business careers. (In today's business world where the influence of government is pervasive, it makes perfect sense for the Jaycees to initiate their membership in dealing with government agencies.) To deprive a large percentage of the working force this same opportunity, solely on the basis of the irrational classification of sex, is offensive to the participants. Further, it puts corporations who are bound to be "equal opportunity employers" in an untenable position, especially those corporations which actively sponsor Jaycee groups and provide Jaycee membership as a fringe benefit to management trainees.

As to the value of preserving the "private sector", the Court must look to the purpose and functions of the organizations and determine whether there is a reasonable basis for the exclusion. Based on all the criteria set forth above, plaintiff contends that there is no reasonable or justifiable ground for allowing an organization having the purposes and functions of the Jaycees to discriminate in their membership policies.

Since the Wahba case, the Second Circuit has had another opportunity to define the state action theory. In Jackson v. The Statler Foundation, 496 F. 2d 623 (2d Cir. 1974), the Court again waded "into the murky waters of the 'state action' doctrine." Jackson at 626.

In Jackson, suit was brought against thirteen charitable foundations alleging discrimination on the basis of race. The District Court dismissed the claim relying on the authority of Moose Lodge v. Irvis, supra. This Court remanded the case to the District Court and set forth new criteria which must be considered in determining whether or not state action exists.

Initially the Court reaffirms the Burton test:

"Whether private conduct which is in some manner aided by the actions of the State is or is

not 'state action' for purposes of the Fourteenth Amendment is not an easy question. Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.

Burton . . . at 722." Jackson at 627.

The Court goes on to note that "several courts have considered claims that the activities of tax-exempt organizations constitute 'state action'" Jackson at 628. This factor is of course present here and has previously been argued by both sides. Local has relied, for instance, upon Falkenstein v. Oregon, supra. and McGlotten v. Connally, supra, and cases following.

Defendants have argued that Falkenstein and McGlotten are incorrectly decided. Yet, the Second Circuit in deciding Jackson, cited those decisions with approval. This court notes a distinction which must be made in dealing with discrimination as opposed to other constitutional claims. There is an explanation for this because of the "double 'state action' standard" which now is recognized. Jackson at 629. When dealing with discrimination the Court will look more closely at the facts and circumstances of each case.

In determining state action the Jackson Court

points to five factors to be considered: (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms. Jackson at 629.

The opinion goes on to say that each of these factors must be considered; no one factor is conclusive.

National dismisses Jackson as being strictly limited to racial discrimination. In fact most discrimination cases litigated to date have involved race. But our courts have noted even the Civil Rights Act is not limited to racial discrimination. Martynn v. Darcy, 333 F. Supp. 1236 (E.D. La. 1971). Furthermore, the District Court in its decision reasons that:

Since we have accepted the
illogic in the racial cases,
. . . we should accept it
in the sex cases as well.
(Joint Appendix, p. A-397)

Whether the Jaycee organization has a legitimate claim to recognition as a "private organization" must be viewed in the light of all the above indicia. The organization is tax-exempt; it holds itself out as being a working partner with the government and solicits and distributes federal (and other government) funds in carrying out its programs; the functions performed are quasi-governmental and public in nature. Finally, no substantive reason for the discrimination against women has been given. The reason for the discrimination appears to be based solely on membership preference and tradition. Yet these preferences and traditions are inconsistent with the new programs and policies of the organization.

It is respectfully submitted that the District Court correctly decided that congeries of factors present in this case are sufficient to constitute state action.

III. THE DISTRICT COURT DID NOT ERR IN FINDING
PERSONAL JURISDICTION OVER THE UNITED
STATES JAYCEE

Pursuant to F.R. Civ. P. 4(e) and the New York C.P.L.R. Sec. 313, the District Court held that personal jurisdiction over the defendant was obtained under C.P.L.R. Sec. 301. The District Court, therefore, found that it was unnecessary to consider whether jurisdiction over defendant

was also acquired under C.P.L.R. Sec. 302.

As will be shown herein, the District Court did not err in finding jurisdiction under C.P.L.R. Sec. 301. Having found jurisdiction under this section, the Court did not go on and apply further jurisdictional tests. However, the Court has jurisdiction over the defendant not only pursuant to C.P.L.R. Sec. 301 but also under C.P.L.R. Sec. 302(a)(1), C.P.L.R. Sec. 302(a)(2), and C.P.L.R. Sec. 302(a)(3).

A. Personal Jurisdiction Under C.P.L.R. Sec. 301

The District Court held that National was "doing business" in New York State and that C.P.L.R. Sec. 301 was operative in granting jurisdiction.^{3/} The Court below agreed that the traditional test for "doing business" was enunciated in Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917), and that there is jurisdiction over a non-domiciliary corporation which is present in New York "not occasionally or casually, but with a fair measure of permanence and continuity." Tauza, at 267.

^{3/} C.P.L.R. Sec. 301. "A Court may exercise jurisdiction over persons . . . as might have been exercised heretofore."

The facts found by the District Court substantiating the "doing business" test and which are not subject to reversal unless clearly erroneous (R. Civ. P. 52(a)) are as follows: (1) National receives dues from Local; (2) National solicits participation from Local for various projects including but not limited to those such as Mainstream which use Federal funds; (3) National awards "seed" subgrants to Local for National's own projects in New York; (4) National enforces membership rules in New York State; (5) these activities have been carried on with continuity over at least the past twenty years. (Joint Appendix, p. A-390).

National now points to Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany, 29 N.Y.2d 426 (1972) saying that the District Court failed to take that case into account (Appellant's Brief, p. 32). National relies almost exclusively on Delagi in its effort to rebut the District Court's determination of personal jurisdiction.

Reliance on Delagi here, is misplaced. A close reading of that case reveals that it concerns a set of facts not applicable to the case at bar. In Delagi, a third party brought suit against a non-domiciliary corporation, con-

tending that the corporation was present in New York through another corporation. The New York Court of Appeals recognized that a third party may obtain jurisdiction over a foreign corporation if there is a parent-subsidiary or a principal-agency relationship between the foreign corporation and the New York corporation. Delagi, then, may be applicable where a third party seeks to assert jurisdiction through an affiliated group of two corporations or entities. Cf. Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972).

There is no third party involved in the case at bar. Local simply asserts that National has been "doing business" under the traditional presence test, which business is a sufficient minimum contact with New York State so that jurisdiction over National can be acquired in New York. In addition, Local has never asserted that there is a parent-subsidiary relationship between National and Local. The Jaycees are a membership corporation with each local chapter having its separate incorporation under the law of its own State. Besides the State incorporation, however, each local chapter must also be chartered by National. As pointed out by the District Court, National has enormous

control over local matters which is indicated by National's ability to control the local organization through the by-law requirements, scrutiny of its membership policies and activities, and the receipt and disbursement of membership dues.

The District Court's decision properly disregarded Delagi and relied instead upon a non-profit membership case presenting no third party involvement. This case is People v. Jewish Consumptives' Relief Society, 196 Misc. 579, 581, 92 N.Y.S.2d 157 (1949). Cf. Weinberg v. Colonial Williamsburg, Inc., 215 F.Supp. 633, (E.D.N.Y. 1963). "Extensive local activities" of the Relief Society, determined on a case-by-case basis, subjected the Relief Society to in personam jurisdiction, and held that they were "doing business" in New York. People v. Jewish Consumptives' Relief Society, supra. National has not even tried to argue the inapplicability of these cases recognizing fully the futility of such arguments.

Major recent cases consistent with the factual framework of the instant case are Bryant v. Finnish National Airline, 15 N.Y.2d 426 (1965) and W. Lowenthal Co. v. Colonial Woolen Mills, Inc., 38 A.D.2d 775, 327 N.Y.S.2d 899

(3rd Dept. 1972). Bryant states that "(T)he test for "doing business" is and should be a simple pragmatic one." In the case at bar, National's activities have consistently included the five facts showing contacts with New York State that are sufficient to establish jurisdiction and, additionally, National prospectively could have more contacts with New York State in order to perform more activities, but those contacts are not now necessary, as the Local performs these additional activities for the defendant National. It would be "impractical" for the defendant National to perform any more activities in New York than it presently performs through Local. Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533 (1967); Bryant v. Finnish National Airline, *supra*.

A review of all the factual contacts and relationships (non-profit membership organizations) present in the State of New York convincingly shows that National is "doing business" in New York pursuant to C.P.L.R. Sec. 301 as the District Court has held.

B. Personal Jurisdiction Under C.P.L.R. 302

1. Under C.P.L.R. Sec. 302(a)(1)

Despite the fact that the District Court

found jurisdiction under C.P.L.R. Sec. 301. National's Brief suggest the absence of jurisdiction under other jurisdictional sections of the C.P.L.R. as well. Therefore it is incumbent on Local to show that jurisdiction may also be had under C.P.L.R. Sec. 302.

C.P.L.R. Sec. 302 authorizes a court to exercise personal jurisdiction over any non-domiciliary which "transact any business within the State." The transacting business test has received a liberal interpretation in the courts. Kramer v. Voql, 17 N.Y.2d 27, 32 (1966); Singer v. Walker, 15 N.Y.2d 443 (1965). National satisfies the jurisdictional requisites of C.P.L.R. 302(a)(1) as it has ^{4/} "transacted business within New York." [Emphasis supplied].

4/"302.(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state . . . "

In the leading case of U.S. v. Montreal Trust Co., 358 F.2d 239 (2nd Cir. 1966), the opinion of Timbers, J. concurring in part and dissenting in part, noted that C.P.L.R. Sec. 302(a)(1) "is a much less restrictive concept than the 'doing business' concept." Montreal Trust, at 251. In Montreal Trust, the majority found that where a persons' activities "demonstrate more than a remote connection with New York," the Court had jurisdiction. Id. at 243.

It seems plain that since the District Court has found jurisdiction under the stricter "doing business" test of C.P.L.R. 301 and that since National by a persuasive preponderance of the evidence has had more than a remote connection with New York, then under the less restrictive "transacting any business" test of 302(a)(1), jurisdiction is obtained over National.

In Schneider v. J & C Carpet Co., 23 A.D.2d 103, 258 N.Y.S.2d 717 (1st Dept. 1965) the Court stated generally that the test under Sec. 302(a)(1) C.P.L.R. was whether the defendant has transacted any business within the State. In fact, the courts have been extremely liberal in regard to this requirement, while examining primarily the degree of the

connections that the defendant has had with the State. See American Eutectic Welding Alloys Sales Co., Inc. v. Dytron Alloys Corporation, 439 F.2d 428 (2nd Cir. 1971).

In the case before this court, National has for twenty years transacted business with Local under the auspices of the Charter granted by National. The very cause of action herein arises and flows from fundamental questions regarding this Charter.

Consequently, National has transacted business in New York and is subject to N.Y. C.P.L.R. Sec. 302(a)(1) jurisdiction.

2. Under C.P.L.R. Sec. 302(a)(2) and Sec. 302(a)(3)

N.Y. C.P.L.R. Sec. 302(a)(2) and Sec. 302(a)(3)^{5/}

grant jurisdiction over the person of the defendant if defendant has committed a tortious act within New York, or,

^{5/} "302(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

cont'd.

alternatively, has committed the tortious act outside of New York having impact on a person or property in New York.

The revocation of Local's charter by National (Joint Appendix, p. A-255) in violation of Local's civil and business rights is the proximate cause of any injury sustained by Local. Rodriguez v. Jones, 473 F.2d 599 (1973); Restatement, Second, Torts Sec. 6. The revocation of the Charter under the extant circumstances constitutes a business tort, as Local will lose their corporate identity and their continued existence will be impaired.

5/ cont'd.

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

In Buckley v. New York Post Corp., 373 F.2d 175 (2nd Cir. 1967) this Court suggests that the degree of damage inflicted upon the plaintiff may tip the scales in favor of jurisdiction.

Further, it follows that asking National to defend this suit in this forum does not offend any sense of due process. National is a large, financially sound organization, with extensive interstate and international transactions with impact directly on the affairs of its 6,500 constituent local member organizations. The case at bar is similarly indistinguishable from the hypothetical "gunman firing across state lines." Buckley, supra, at 179. The resultant injury to the plaintiff impacts in New York.

National satisfies the additional tests of C.P.L.R. Sec. 302(a)(3)(i) and (ii) because it regularly solicits business and engages in a persistent course of conduct by monitoring Local's civic, educational and financial activities (Joint Appendix, p. A-63). Also, National should have reasonably expected that its revocation of Local's Charter would have had direct consequences in New York.

In further satisfaction of the requirements of C.P.L.R. Sec. 302(a)(3)(i) and (ii), National derives sub-

stantial revenue in interstate commerce. Mr. Roper testified that in 1974 approximately \$1.2 million in income would come from membership dues, with an additional \$340,000 income from the sale of supplies to local chapters (Joint Appendix, p. A-87). Mr. Roper further testified that the dues were transmitted by the local chapters to the State organization which in turn mailed the dues to National in Tulsa (Joint Appendix, p. A-95).

In Path Instruments International Corp. v. Asahi Optical Co., 312 F.Supp. 805 (S.D.N.Y. 1970), the Court held that a conspiracy to destroy plaintiff's business by various unfair methods was tortious conduct and a basis for invoking long-arm jurisdiction, assuming the additional statutory criteria are met. The Court further pointed out that the "substantial revenue" critereon was not a test of dollars and cents, but the overall non-local scope of the company is a governing factor. The substantial revenue element likewise is also present and hence there is jurisdiction.

C.P.L.R. Sec. 302(a)(2) and C.P.L.R. Sec. 302(a)(3) are applicable here but if this Court affirms the District's finding of jurisdiction under C.P.L.R. Sec. 301,

reference to Sec. 302 is obviated.

CONCLUSION

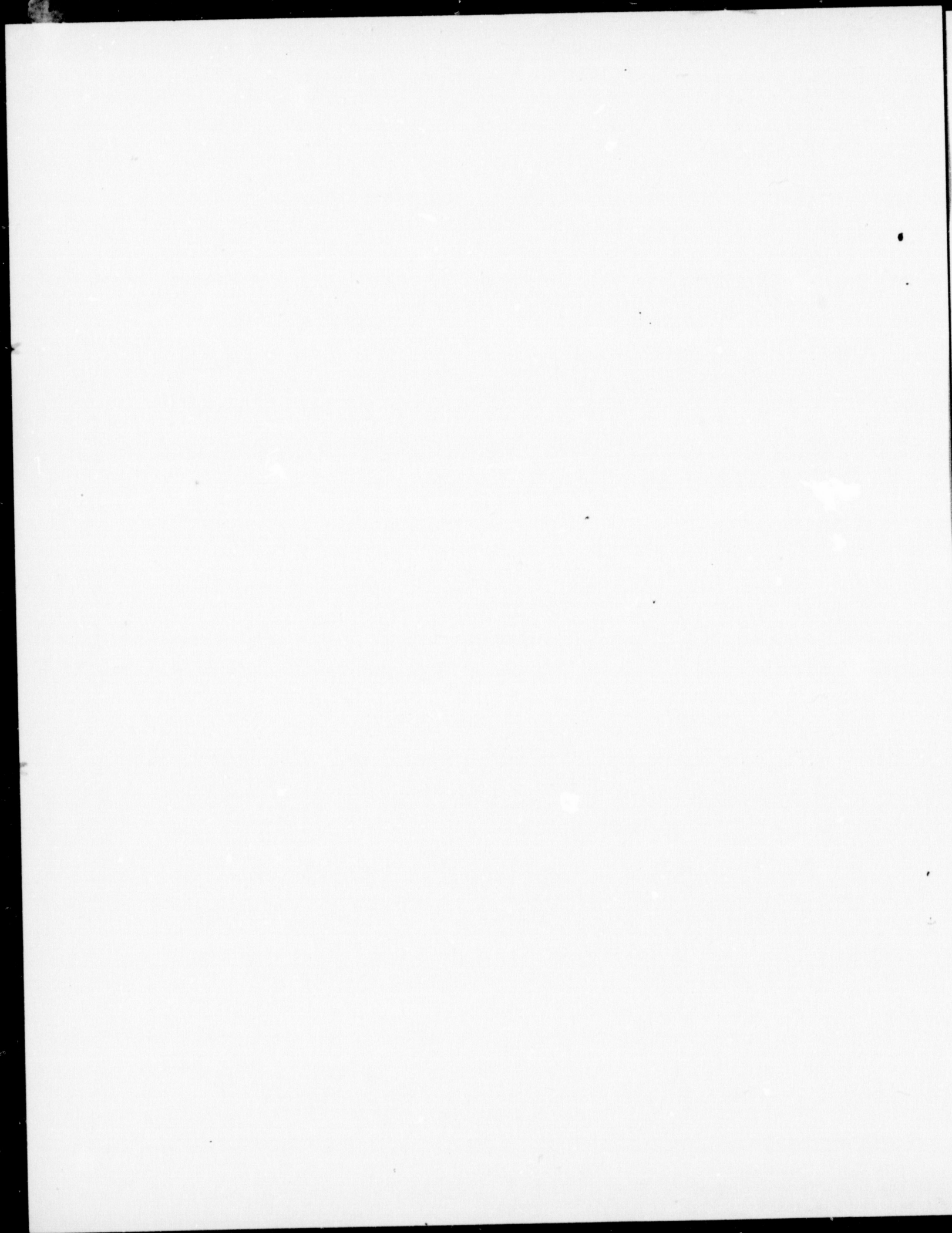
The District Court did not abuse its discretion in granting the motion for a preliminary injunction. It correctly found state action to be present and thus had proper jurisdiction over the subject matter. Further, the District Court did not err in finding personal jurisdiction over appellart United States Jaycees. Accordingly, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

DOMAN & BEGGANS
Attorneys for Appellee
295 Madison Avenue
New York, New York 10017

Of Counsel:

Sheila Maura Kahoe
Nicholas R. Doman
Ronald E. Pump

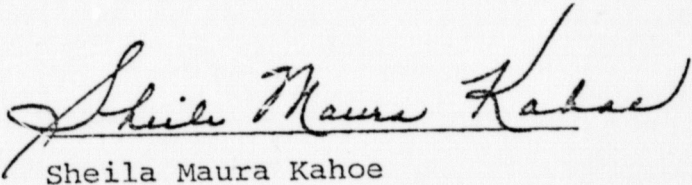


CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee's Brief together with the Supplemental Appendix of Appellee was served upon the Appellants by mailing two copies thereof, properly addressed and postage prepaid to:

Robert J. Corber, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for the Appellants

this 15th day of October, 1974.


Sheila Maura Kahoe